UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17CV 2218

CORY REID,Plantiff,

-Against-

CITY OF NEW YORK,et al,

Defendants.

C I V I L R I G H T S

42 U.S.C.S.1981,1983,1988...
Authorized by
28 U.S.C.1331 and 1343(A3)

Plantiff,CORY REID qwas a defendant in a criminal prosecution tha t alleged three different complaints that took place is supreme c ourt part 71 in the county of new york,NY,10013,100 centre street from 8-11-2013 til 9-28-2015. Plantiff now resides at the geroge mothcan detention center located at East Elmhurst Ny 11370 dorm 3 lower B (c-73).

Defendants.
City of New York,coroporation counsel,100 church street,NY,NY,100 07.

Laura.A.Ward,supreme court judge,100 centre street part 71 NY,NY, 10013.

Clerk of court who read out the indictment charges to cory reid i n supre3me court part 71 on 9-30-2013.

Annie Constanzo,49 Thomas street,NY,NY,10013,legal aid society.

Lawrence Scharwtz,576 Fifth Avenue suite 903 NY,NY,10036.

Richard Siracusa,299 Broadway,NY,NY,10007.

Anne.B.Rudman,31 Easat 79th street suite 14w,NY,NY,10075.

Ariel.B.Pizzitola ADA ONE hogan place,NY,NY,10013.

Troy Wilson,ADA one hogan place,NY,NY,10013.

Samuel David,ADA One hogan place,NY,NY,10013.

Detective Frank Ftransisco,6th precint,233 west 10th street NY,NY

Officer Danielle Wubnig,6th precint,233 west 10th street NY,NY.

Officer Joseph Tanriello,6th precint,233 west 10th streeet NY,NY

Officer Brian Garcia,6th precint,233 west 10th street NY,NY

Physciatrist John doe,100 centre street,NY,NY,10013 12th floor.

Physcologist Jane doe,100 centre street NY,NY,10013 12th floor.

Heath and hospitals coroporatoin,Bellvue physciatric unit.

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Probable cause to arrest

The quamtum of evidence required to established probable cause to arrest need not reach the level of evidence necessary to support a conviction,but it must constitute mopre than rumor,suspicion,or even a 'strong reason to suspect! Although the existence of proba ble cause must be determined with reference to the facts of each case,in general probable cause to arrest exists when the officers have knowlwedge or reasonably trustworthy infromation of facts an d circumstances that are sufficient in themselves to warrant a pe rson of reasonable caution in the belief that(1)ab offense has be en or is being committed(2)by the person to be arrested. I n dete rmining probable cause, "facts relied upon must not be susceptibl e to innincent or am biguous explanation.WU v.CITY OF NEW YORK,

In Oliveria v.Mayer,23 f.3d 642(2d cir.1994),the court of appeals ruled that "information about criminal activity provided by a sin gle complainant can establish probable cause when that informatio n is sufficiently reliable and corroborated. Yet,even if bystande r witnesses are consideree presumptively reliable and a report of a crime alone will not necessarily establish probable cause. 23 f 3d at 647,citing fuller v.M.G.Jewerly,950 f.2d 1437,1444(9th cir 1991)before making an arrest,police officers had a duty to conduc t an investigation into the basis of the witness report. Lower co urts in this district aslo require some independent corroboration before elevating the word of an eyewitness or victim to the stat us of probable cause. When a putative victim precisely identies t he alleged perpetrator of a crime and there is independent corrob orative evidence to support at least some of the victim's asserti ons,a person of reasonable caution is warranted in believing that an offense has been committed by the alleged perpatrator. Marin v Viggiani,1993 U.S.Dist.LEXIS 14056(S.D.N.Y.)Similiar reasoning wa s applied in Miloslavsky v.AES Engineering Soc.,Inc.,126 L.ED. 2d 37(S.D.N.Y.)in which the court ruled that "it is well established that a law enforcement official has probable cause to arrest if h e recieved his information from some person,normally the putative victim or eyewitness,who it seems reasonable to believe is tellin g the rtruth

See also Bevier v.Hucal,806 f.2d 123,128(7th cir.1986)A police officer may not close his or her eyes to facts that would help clarify the circumstances of an arest. Reasonable avenues of investigation must be pursued especially when...it is unclear wheter a crime had even taken place. The law in this circuit is, therefore,that uncorrorobated allegations by an eyewitness or vic tim do not necessarily establish probable cause. Second circuit case law stresses the importance of investigation and corroborati on.

Probable cause to prosecute ..

Probable cause to prosecute under New York law is "the knowledge of facts,actual or apparent,strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of.DUKES v.CITY OF NEW YORK,87 9 f.supp 335.UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRI CT OF NEW YORK.

A person acts under color of state law if he misuses "power' poss essed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law...

A motion to dismiss for failure to state a claim should not be granted unless it appears toma certainty that the plantiff would be entitled to no relief under any state of facts which could be proved in support of his claim..DES ISLES v.EVANS et al,200 f.2d 614.

PLantiff suing for violation of rights,pursuant to 42 U.S.C.S.198 3,are entitled to compensatory damages only upon proof of actual injury.

Apublic official is personally liable for actions taken while dis charging his official responsibilites only if:(1)He knew or reaso nably should have known that the action he took whihin his sphere of official responsibility would violate the constitutional right s of the individual affected,or(2)if he took the action with the malicious intention to cause a deprivation of constitutional righ ts or other injury to the individual.Familias UNIDAS v.BRISCOE,

Complaint:

The right not to be prosecuted or arrested without probable cause has long been a clearly eatablished constitutional right.GOLINO v CITY OF NEW HAVEN,950 f.3d 864,UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

"Actual innocence' means factual innocence not mere legal insuffi ciency.DUNHAM v TRAVIS,313 f.3d 724,UNITED STATES COURT OF APPEAL S FOR THE SECOND CIRCUIT.

An affirmative demonstration of innocence is not required to meet the 'favorable termination'factor in a 42 U.S.C.S.1983 malicious prosecution cause of action.RIVAS v SUFFOLK COUNTY,326 f.supp.2d 355.

8-11-2013 in the county of New York also known as the west villag e the plantiff was invited inside of building residence by a youn g female to drink some of her alcohol with her while her boyfrien d was asleep in the apartment where they stayed at. After about t wo hours of drinking alcohol with the cv in the tenant yard the c v's boyfriend woke up ran out the apartment and choked the planti ff causing his left ear to bleed(neighbor called 911 from all the noise since there was windows in the front,back and on each side of us). Once the boyfriend released the plantiff from the chokeho ld,the plantiff ran out the building one block west then headed e ast to the lower aest side where he lived at all his life,stumbli ng from all the alcohol when he suddenly noticed a police aar was behind him,two cops got out of the car defendant tanaRIELLO and g arcia and one of them stated 'we are not going to lock you up we know her she has done this before' and the plantiff was wondering done whatr before. Then one of them stated but we have to take yo u back to the building to see if she is making a complaint(under federal law,a police officer may approach an individual and initi ate preliminary questioning without implicating the Fourth amdmen t such an encounter becomes a seizure only when the officer appreh ends the citizen by means of physical force or show opf authority and creates a detention from which a reasonable person wopuld not feel free to leave.Landsman v.Village of handcock,296 ad2d 728)

(4)

(1st arrest)so the defendants placed the plantiff in handcuffs wi thout telling for what(NYCPL.140.15 subd 2)and placed him in a ho t unventilated squad car with the windows rolled up. Once they ar rived at the building the cv was standing there with her boyfrien d and the two defendants got out of the car heard her story,got b ack inside car and took plantiff to the 6th precint,back at the 6t h precint the plantiff was charged with three charges under NY pe nal laws that he did not find out about until the charges from th e second arrest was dismissed. 1st charge 130.20 subd 1 sexual mi sconduct which means the cv had to tell defendants that the plant iff put his penis into her vagina without her permission. 2nd cha rge attempted rape in the 3rd degree 110/130.25 subd 2 which mean s that the cv had to tell the two defendants that the plantiff at tempted to put his pebis into her vagina but was prevented and th at she was under the age of 17yrs. 3rd charge assault in the 3rd degree 120.00 subd1 which means the cv had to tell the two defend ant that the plantiff caused her substantial pain or they noticed a physical injury on her that the plantiff caused. All class a mi sdemeanors punishable up to one yr in a county jail.(365 days). W hile at the precint the plantiff was in a holding cell with his e ar bleeding. By law NYCPL.1.20 subd 7 tanariello and garcia had t o file a misdemeanor complaint to commence a criminalk action.NYC PL.1.20 subd 16(a)(b) subd 17. Followed by a supporting depositio n.NYCPL.100.20 stating facts of evidentiary character which tend to support the charges in the misdemeanor complaint. Those two de fendants gave the case to defendant danielle wubnig she became th e new arresting officer(an arrest is defined as to deprive a pers on of his liberty by legal authority,custody of another for the p urpose of holding or detaining him to answer to a criminal charge people v.Hasenflue,648 nys2d 254)the plantiff was in a holding ce ll with his ear bleeding screaming 'what are my charges? and can your please call the ambulaance my ear is bleeding and defendant wubnig kept saying 'we dont know your chatrges yet we have to spe ak to a prosecutor.(NYCPL.140.15 subd 2). A shortime later def.wu bnig took the plantiff to meet with defendant fransisco(detective) and they both told him that he cannot go to the hospital until he told them what happened in the building(write statement)

1st

After plantiff wrote a state ment he was taking back to holding c ell and a shortime later defendant wubnig followed NYCPL.140.10 s ubd 1 and took the plantiff fingerprints and photograph in harmon y with NYCPL.160.10 subd 1b for NYPL's 130.20,110/130.25 sub 2 an d 120.00 sub 1 see NYPL.130.00 subd 1(since the duty to take fing erprints arises following an arrest which means to come after,peo ple v. Hasenflue,648 nys2d 254). After the fingerprints came back from the commissioner of the division of criminal justice service (NYCPL.160.10 subd 4)another officer came to the cell with shackl es and the plantriff stated are we going to the hospital now? and wubnig stated no the prosecutor wants to see you first.(A t no pl]ace in this article(160)is there any authority for taking and re taining the photograph of an individual,without probable cause or arrest. All fingerprinting and photographing must be done where v alid arrest has been made,not merely for investigatory purposes. people v.Johnson,389 nys2d 48).After plkantiff made oral statemen t with defendant Ariel pizzitola(ADA)he was escorted out of the r oom by derf.wubnig and stated are we going to the hospital now?an d wubnig stated no the judge wants to see you right away due to y our charges and the plantiff stated what are my charges and wubni g showed the plantiff that central booking papaer and stated well the other two cops charged you with these misdemeanors(but didnt tell him what type of misdemeanors)and stated but the prosecutor is probably going to charge you with felonies.(2nd arrest).

The requirement in the definition for reasonable cause is not jus t a "person of ordinary interlligence" but it should apply to a p erson of"judgement and experience" and thereby include an attorne y,or judge,with knowledge of the cases and the law.People v.Minut o,71 Misc. 2d 800...It would be manifestly unjust to charge paers ons with crime on pure unidentifiable hearsay.People v.James 4 N. Y.@D 482,Court of Appeals of New York.

8-12-2013 The plantiff met iwth his first defense attorney defend ant Annie constanzo and she told him that he was arrested for NYP L's 130.50subd1 and 130.65 subd1(2nd arrest charges from def,wubn ig. Once in the courtroom the plantiff was arraigned on one count of 130.50 subd1 and one count of 130.65 subd 1(2nd arrest charges)but he never got arraigned on the 1st arrest charges that tanari ello and garcia

charged him withNYPL's 130.20subd1,110/130.25 subd2 and 120.00sub 1 also see 130.00 subd 1 and NYCPL.170.10 subd 2,4a but got prose cuted on those charges here is how the plantiff knows:
the plantiff never got fingerprinted on the mouth to vulva and se xual abuse charges those charges were thrown in after he spoke wi th def.pizzitola(made statment). But in order to arraign the plan tiff on the mouth to vulva and sexual abuse charges def wubnig ha d to file a felony complant since the sexual acts differed NYCPL. 1.20 subd 8 to mommence a criminal action NYCPL.1.20 sub 16,17 fo llowed by a supporting deposition stating facts of evidentiary character which tend to support the charges in complaint and if s he did do that you got a misdemeanor complaint alleging penis to vagina and you got a felony complaint alleging mouth to vulva bot h on the same complaining victim in the matter of a few minutes l ike alleged by cv.
8-16-2013 the plantiff got indicted on one count of 130.50subd1 a nd two counts of 130.65 subd1,but it was no way the grand jurors made a prima facie case out of the element fo forcible compulsuio n NYPL.130.00subd 8. The cv openly invited a strange male in her building to drink some of her alcohol with her,they was in the te nant yard where there was windows in the front,back,and on each s ide of them,a nieghbor could have came down at any time,they bopt h weighed about the same and was about the aame hieght and her bo yfriend was asleep in the apartment maybe 10 seconds away so how was she scared,how did she fear death or a physical injury,plus h er boyfriend was a professional fighter.

9-30-2013 in supreme court part 71 the plantiff was arraigned on the indictment and the clerk of courtn read out the indictment c harges he stated the defendant had been induicted on one count of criminal sexual act to wit mouth to vulva in the first degree by forcible compulsion and two counts of sexual abuse by forcible on pulsion and then stated 'and several other charges'he did nopt sa y what the several other charges were but they were the 1st arres t charges(130.20,110/130.25,120.00).

defendant ward and constanzo heard that.

10-15-2013 the plantiff asked def constanzo why did the grand jury accuse him of mouth to vulva when the cv clearly stated mouth to vagina(130.00 2a mouth to vulva or vagina)and def constanzo stated that it was the same thing. The plantiff then stated that the prosecutor (def pizzitola)got the charges from the plantiffs statemtn when he stated that the female alłowed him to kiss below her belly button and feel on her body two separate times.

12-2-2013 the plantiff fired def constanzo in supreme court part 721 because she never argued orally or written (motiopns) about indictment being jurisdictionally defective,never taking pictures in building and the plantiff wasn't aware ofg this during the proceeding about 1st arrest charges from tanariello and garcia. that day defendant lawrence scharwtz became the plantiff's second attorney.

1-13-2014 def scharwtz left the case and he never told plantiff about 1st arest charges or took pictures or argued orally or written about indictment being jurisdictionally defective. That day defendant richard siracusa became the plantiff's attorney and he told def siracusa if you want to be my attorney you have to challenge the indictment(2nd arrest charges)due to it not alleguing a crime the girl complained of and alsoi you have to go to the building to take pictures and def siracusa stated I am going to have you evaluated.

Around that time def pizzitola left the case and defendant ADA Troy wilson became the new head ADA assigned to prosecute the 1st arrest charges from tanariello and garcia(130.20,11/130.25,120.00) and 2nd arrest charges from wubnig(ind no 3709/13,13050,130.65) and from the files she recieved from defendant pizzitola she knew the plantiff was never arraigned on the 1st arrest charges and the indictment came from the plantiff's statement.

ABA Standards for criminal justice.

Standard 3-1.2. the fuction of the prosecutor.

(D).It is an important function of the prosecutor to seek to refo rm and improve the administration of criminal justice when inadeq uqacies or injustices on the substantyive or procedural law come to the prosecutors attention,he or she should stimulate efforts f or remedial action.

Feb-3-2014 the plantiff forwarded a complaint via mail to the gri evance committee complaining about Ariel blinton pizzitola.2014-0 258.

Around the ending of march the plantiff was called in tb 100 cent re street on the 12th floor by defendant john doe and jane doe.Wh en the plantiff went indide the room he saw def siracusa and stat ed to him I told you sir that I don't need this I need you to cha llenge the indictment and go to the building to take pictures so please if you are not going to do that please leave me alone and the plantiff walked out the room with tears in his eyes.

30 days later the plantiff was called to that room again by john doe and jane doe and this time when the plantiff walked indef sir acusa wasn't there and the plantiff looked around and quickly tol d the doctors there is nothing wrong with me I understand the ch arges against me,I am able to assist in my own defende and I am n ot a danger to myself or others I just want help with my case and then showed them the complaint he made against defendant pizzitol a 2014-0258 and then walked to the ddoor to exit and the man doct or john doe stated top the plantiff Mr.Reid if you do not talk to us we will send you to bellvue and the plantiff stated there is n o need for that because there is nothing wrong with me as you can see and I wont talk to you there iehter what I need is someone to help me with my criminal case and walked out with tears in his ey es.

30 days after that the correction officers told the plantiff that he was going to mcourt and when he got down stairs they gave him]a orange jumpsuit and told him that he was court ordered togo to bellvue hospital and the plantiff stated I dont need to go there I am not going there and several officers came inside the bullpen forced him out of his clothes to put on the orange suit handcuffe d him with force and then carried him to the bus and all the plan tiff could do is cry. At bellvue hospital they held him down so t he doctor can draw his blood the plantiff did not speak to any of the doctors there so they sent him back in 7 days.

The plantiff mentions two things that took place on 8-11-2014 and]that was suppose to take place on 8-11-2014.

First in supreme court part 71 where he met with defendant ward a nd siracusa. Def ward stated that they found him fit to proceed a nd the plantiff stated how they found me fit to proceed if I neve r submitted to anyone there and then stated why did you send me t o bellvue anyway? and def ward stated because you was acting erra tic and the plantiff stated I just need an attorney to help me wi th my case. That day the plantiff recieved a new attorney defenda nt Anne.B.Rudman. Second the plantiff men5tions that the 1st arre st charges from defs tanariello and garcia(130.20,110/130.25 and1 20.00)was suppose to terminate on 8-11-2014 that day made 1 year for all the class a misdemeanors. Those charges the plantiff was never arraigned on in any court of law and those charges were nev er dismisssed on that day in any court of law.(There can be only one criminal action for each set of criminal charges brought aga inst a particular defendant,notwith standing that the original a ccusatory instrument may be replaced or superseded during the cou rse of the action.People v.Lomax,50 ny2d 351.) See 9-30-2013 when thew clerk of court stated and several other charges,the indictme mt superseded the misdemeanor complanit. But the court never aqui red jurisdiction over the defendant for those charges and he neve r consented to be prosecuted by misdemeanor complaint.

10-27-2014 the plantiff fired def rudman because she did not chal lenge the indictment,take pictures inside of building residence and the plantiff did not fire her for this reasson but never told him his 1st arrest charges from defs tanariello and garcia. That day the plantiff made a timely request to proceed as his own atto rney.

11-14-2014 the plantiff sent to def ward via mail 4 motions notar ized that day one in particular to dismiss in dictment pursuant t o NYCPL.210.30 to inspect grand jury minuted tyo see if they were sufficient complamning about the elementy of forcible compulsion and the mouth to vulva and def ward denied it in a decision and o rder dated 12-2-2014 but he did not recieve that decision and ord er to after dec-2 court appearance.

The court now holds that where a grand jury indictment is reviewe d by a state judge and dismissed due to total lack of evidence in support of one of the elements of the crime charged,ther presumpt ion of probable cause raised by that indictment will fall.COX v.C OUNTY OF SUFFOLK,827 f.supp.935.

NYCRR.100.3 adfmin.pol. rule b4 states in pertinent part. A judge shall perform judicial duties withoutbias or prejudiee against or in favor of any one.

NYCRR.100.3 admin.pol. rule b7 statesd a judge shall dispose of a lljudicial matters promptly,efficiently,fairly.

Around that time def Wilson left the case and defendant Samuel da vid became the new haed ADA assigned to prosecute the 1st arrest charges from tanariello and garcia(130.20,110/130.25,120.00)and 2 nd arrest charges from wubnig(ind no 3709/13 130.50,130.65)and fr om the files he recieved from def wilson he knew that the plantif f was never arraigned on the 1st arrest charges and the indictmen t came from the plantiffs statement.

ABA Standards for criminal justice.
standard 3-1.2.The function of the prosector.
(D)It is an important function of the prosecutor to seek to refor m and improve the administration of criminal justice when inadequ acies or injustices in

the substantive or procedural law come to the prosecutors attenti on,he or she should stimulate efforts for remedial action.

12-2-2014 in supreme court part 71 def david stated that the witn esses are ady for trial and def ward set a trial day for some day that month(can't recall what exact day).

Afew days later in the mail the plantiff recieved a decision and order dated 12-2-2014 stating that the plantiff's pro-se pre-tria l motions were denied in it's entirety,that he waisted enough of the court's time stalling and an affirmed trial date is set fro 1 -20-2015.

1-20-2015 in supreme court part 71 a prosecuting attorney stated that the cv was pregnant out the country and good chance that she was not coming back. First how def ward affirmed(meaning to confi rm)a trial date and all of a sudden the witness(cv)is (pregnant) out6 the country and good chance she is not coming back. Second t he cv was not pregnant at that time because if youlook at the ora l statement the plantifff made with def pizzitolahe stated when he got on his knees to kiss below the cv's belly button she looke d down at him and stated while touching her stomach 'look I thin k i'm pregnant' she was about 3 weeks to a month then(8-11-2013) meaning she had her baby around april 2014 and that can be proved

That day def ward set a date for hearings and trial for 4-6-2015.

4-6-2015 in supreme court part 71 the prosecutor stated that the witnesses is back needs 10 weeks to recooperate and will be ready for trial and then offered the plantiff a 5yr sebtence.

6-9-2015 the plantiff's legal advisor def rudman stated to the pl antiff while he was in the bullpens 'we know you did not do it th e girl lyed she was drink. Inside the courtroom def rudman stated your honor I am conveying this information for mr.reid 'we know h e did not do it the girl lyed she was drunk. def ward stated well if mr.reid don't file no more motions he can get this case dismis sed. The plantiff filed a habeas corpus prior to that day complai ning about the vulva charge abd it was granted by ex parte motion office in 60 mcentre street.

6-30-2015 def ward stated the plantiff do not have enough speedy trial time and set the case to the honorable Michael.J.Obus so h e can give a more potent answer.

7-15-2015 insuprme court part 51 in front of the honorable obus the plantiff was released on his own recognizance and def david stated that he was going to toronto,canada to get the witness to bring her back here to testify.

8-26-2015 in supreme court part 71 a prosector stated they went t o canada but the cv stated she did not want to testify against th e plantiff.

9-28-2015 The 2nd arrest charges got dimidsed and even though the plantiff was never arraigned on the 1st arrest charges and they s hould have been dismissed on 8-11-2014.

The plantiff wonders how did he put his penis into the cv's vagin a without her permission,attempt to put his penis into the cv's v agina and she was under17yrs of age,physically assault her causin g substantial pain or physical injury,then put his mouth to her vulvaq by force and sexually abuse her two separate times by forc e in the matter of minuted like she alleged.

...IND NO.3709/13 was tainted,inadmissible against plantiff a nd should have been suppressed as "fruit of the poisounous tree" because defendant Danielle wubnig acted with knowledge of and pur suant to NYCPL.statue 160.10 sub1B with intentions to deprive the plantiff of his federal right under the U.S.Const. not toi be com pelled to be a witness against himself(and it worked)because she did not want to let the plantiff go just like that.NYCPL.140.20 s ubd 4.

To allow a police officers statement of what a defendant is alleg ed to have said to serve as the only basis for an ongoing prosect ion opens the door to potential abuse.People v.Alvarez,141 misc.2 d 686.

It is theoretically possible for a plantiff to premise a maliciou s prosecution claim on some other constitutional right.SINGER v.F ULTON COUNTY SHERIFF,63 f.3d 110.UNTIED STATES COURT OF APPEALS F OR THE SECOND CIRCUIT.

Under the federal rulesa of Civil Procedure a case consists not i n the pleadings,but the evidence for which the pleadings furnish the basis. Cases are generally to be tr4ied on the proofs rather than the pleadings. DES ISLES v.EVANS et al,200 f.2d 614.

This court looks to state law to determine when adversary judicia l proceedings have been commence3d. In New York,the filing of the accusatory instrument,which includes a misdemeanor and felony com plaint commences a criminal action. See N.Y.Crim.Pro.Law 100.05. Also see 16A,17,18 from NYCPL.1.20. Accordingly adversary judicia l proceedings were commenced against plantiff on 8-11-2013 the da te the misdemeanor and felony complaint was filed.

Plantiff can prove by a reading of the minutes and by his rap she e t that he was not arraigned on the misdemeanor complaint on 8-1 2-2013 in the local court arraignment,those charges are styill pe nding right now.

After the filing of an accusatory instrument,the defendant must b e promptly arraigned.MURPHY v.LYNN,118 f.3d 938.UNITED STATES COU RT OF APPEALS FOR THE SECOND CIRCUIT.
The plantiff is concluding that a party is "siezed"in a constitut ional sense for so long as a prosecution is pending.SINGER v.FULT ON COUNTY SHERIFF,63 f.3d 110.Also see attached NYCPL.1.20 subds 7,16A,17,18.

Plantiff can prove by this court looking at the felony complaint filed by wubnig the CV stated the plantiff put his mouth to her vagina(130.00 2a mouth to vulva or vagina)and wubnig signed that complaint but charged the plantiff with mouth to vulva and as a w oman she knows the difference. No mistake of law for a lady deali ng with this charge the same goes for ward,rudman,constanzo,pizzi tola,wilson.

Corroboration of the commission of a crimen for a felony is manda tory at the accusatory stage.N.Y.CRIM.PROC.LAW.190.65. People v.A lvarez,141 Misc.2d 686.

Without studying law any person knows that you need evidence in a criminal case to convict or even hold in jail.

NYCPL.1.20 subdivision 40 "evidence in chief" means evidence reci eved at a trial or other criminal proceeding in which a defendant s guilt or innocemce of an offense is in issue,which may be consi dered as a part of the quamtum of substantive proof establishing or tending to establish the commission of such offense or an elem ent thereof of the defendants connection thertewith.

190.65. Grand jury;when indictment is authorized.

1. Subject to the rules prescribing the kinds of offenses which m ay be charged in an indictment,a grand jury may indict a person f or an offense when(A)the evidence before it is legally sufficient to establish thaat such person committed such offense provided,how ever,such evidence is not legally sufficient when corroboration t hat wopuld be required as a matter of law to sustain a conviction for such offwense is absent,and(b)competent and admissible eviden ce before it provides reasonable cause to believe that such perds on committed such offense.

(De facto arrest)2nd arrwest charges initiated by wubnig since wh en plantiff was in custody pursuant to subdivision 2 of section 2 05.00 means restraint by a publ;ic servant pursuant to an authori zed arest or an order of a court. Plantiff was in custody stemmin g form the 1st arrwest charges.

The law requires the plantiff asserting malicious prosecution to establish what occured in the grand jury and to further establish that these circumstances warrant a finding of misconduct sufficie nt to erode the premise that the grand jury acts judicially.Baile y v.City of New York,79 f.supp.2d 424.

Charge 1 NYPL.130.50 mouth to vulva(130.002a mouth to vulva or va gina)if a reading of the grand jury minutes reveals mouth to vagi na the plantiff is legally innocent of mouth to vulva.

130.65 subd 1 two counts now the plantiffs indictment did not sta te the exact nature of the sexual abuse charges but the felony co mplaint that was read to the plantiff by def constanzo the cv cla imed that the plantiff inserted his fingers inside her vagina. If an expert did not testify(190.30 subd 2)in the grand jury to that happening in harmony with rape kit the plantiff is innocent of th e crime charged. Did the physician prepare a vitullo rape kit of nail,vaginal,oral and hair specimens(190.30subd 2,1.20 subd 40).

Forcible compulsion,130.00 subd 8A... In the felony complaint def constanzo read to plantiff the cv stated the plantiff did the cri me by throwing her on the floor licking her vagina and inserting his fingers in her vagina. If the plantiff committed a crime like that was her clothes torn or ripped? and if not how did she say t he plantiff got offo her clothes?. Did she scratch the plantiff? punch him?,kick him?,try to escape,scream loud sb nieghbor could have heard?,did an expert testify to here battered position,did an experet testify that the pain was to overwhelming to prepare a rape kit?,did other witnesses such as her boyfriend and police corroborate or testify to a bruised and hysterical condidtion jus t afgter the alleged attack? DID A Physician testify to her havin g any bruised or lacerations since she complained the plantiff th rew her on the floor because if he did it wouldn't have been a ni ce throw. If none of the above force was not shown to have happen ed./

If grand jury minuted do not disclose evidence of violation of st atue involved indictment must be dismissed. People v.Mangan,252 N YS 44.

The plantiff can also prove that when his attorney def constanzo mailed him his indictment,felony complaint andf in particular Vol untary disclosure form(VDF)def fransisco stated in pertinent part that the plantiff stated to him "the bitch kept screaming so I ke pt jamming my fingers in her vagina. I f the plantiff did commit a vicious crime like that it would have been corroborated by an e xpert inn the medical field(NYCPL.190.30sub2,NYCPL.1.20 sub40)IF not that proves ill will and malice

The plantiff can also prove in that same (VDF)def fransisco state d that the plantiff told him that he put his mouth to the CV's v agina. I f so he would have corroborated that crime at the grand jury by medical testimony(RAPE KIT WITH THE PLANTIFF's SALIVA). Because on 1-28-2014 after the plantiff spoke on the record in pa rt 71 he was given a swab by some lady that was awiting him in th e hall which means the plantiffs indictment would have stated mou th to vagina like she complained of not mouth to vulva like the p lantiff complained of.(NYCPL.60.50).That statue requires corrobor ation by independent evidence of the body of crime.

Since it was known to all other law enforement officials and cour t officials doid the grand jurors know that the cv invited a stra nge african-american male inside her building early in the mornin g toi dr4ink some of her alcohol with her while her boyfriend was asleep in thier apartment? and if so did they question it?. Evidenc3e must overcome the presumption of innocence.People v.Nic osia,298 NYS 591.

The plantiff can also prove that the same time he filed the habea s corpus in the 1st depatrment hea also filed an article 78 notar ized the same day for def ward to allow the plantiff to inspect t he grand jury minutes(whcih this court could get andf read) he di srribed cle3ar violations of constitutional rights of which a rea sonable person would have known that they were violating. All of a dudden def rudman came and told the plantiff they know he did n ot do it the girl lyed she was drunk. See they wanted to keep the grand jury minuted away from the plantiff that mans all the defen dants been knew on 8-11-2013 the girl lyed she was drunk which pr oves more than intentional conduct(mis)

Plantiff must alleged an injury fairly traceable to the defendant s allegedly wrongful conduct and likely to be redressed by the re quested relief. ALLEN v.WRIGHT, Plantiff relies on what the supreme court of the united states stated in Powell v Alabama,supra:

"during perhaps the most critical period of the proceedings against these defendants,that is to say,from the time of thier arraignment until the beginning of thier trial,when consultation,thoroughgoing investigation and preparation were vitally important the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

Depriving a person,formally charged with a crime,of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.

The right of counsel extends to the preparation for trial,as well as to the trial itself. As Professor Chafee once said, "A person accused of crime needs a lawyer right after his arrest probably more than at any other time. " When he is deprived of that right after indictment and before trial,he may indeed be denied effective representation by counsel at the only stage when legal aid and advise would help him.

Plantiff relies on what the supreme court of the united states stated in Avery v Alabama,308 US 444 has relevance here:

"...the denial of opportunity for appointed counsel to confer,to consult with the accused ad to prepare his defense,could convert the appointment of counsel into a sham and nothinhg more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel."

The supreme court stated in SPANO v NEW YORK,360 US 315...

...What followed the petitioners surrender in this case was not an arraignment in a court of law,but an allnight inquisition in a prosecutor's office,a police station,and a automobile. Throughout the night the petitioner repeatedly asked to be allowed to send for his lawyer,and his requests were reapeatedly denied. H e finally was induced to make a confession. That confession was used to secure a verdict sending him to the electic chair.

Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom,presided over by ajudge,open to the publiw,and protected by all the procedural safeguards of the law. Surely a Constitution which promises that mnch can vouchsafe no less to the same man under midnight inquisition in the squad room of a policew station./

In determining the sufficiency of the complaint,the material fact s,but not the unsupported conclusions of the pleader,are consider ed in the light most favorable to the plantiff. Civil proceedings in vindication of civil rights are goverened by the Federal Rules of Civil Procedure,42 U.S.C.S.1988;Fed.R.Civ.P.1. Under those rul es,the theory of the plantiff in stating his claim is not so impo rtant. The complaint should not be dismissed on motion unless,upo n any theory,it appears to a certtainty that the plantiff would b e entitled to no relief under any state of facts that could be pr oved in support of his claim.LEWIS v.BRAUTIGAM,227 f.2d 124.

In order to state a claim of conspiracy under 42 U.S.C.S.1983,the complaint must contain more than mere conclusory allegations. Whi le a plantiff should not plead mere evidence,he should make an ef fort to provide some details of time and place and the alleged ef fect of the conspiracy. Thus,complaints containing only conclusor y,vague,or general allegations that the defendants have engaged i n a conspiracy to deprive the plantiff of his constitutional righ ts are properly dismisssed;diffuse and expansive allegations are insufficient,unless amplified by specific instsances of misconduc t.DWARES v.CITY OF NEW YORK,985 f.2d 94.

Under the Federal Rules of Civil Procedure a case consists not in the pleadings,but the evidence,for which the pleadings furnish th e basis. Cases are generally to be tried on the proofs rather tha n the pleadings.DES ISLES v.EVANS et al,200 f.2d 614.

....Decency,security,and liberty alike demand that goverment o fficials shall be subjected to the same rules of conduct that are commands to the citizen. In a gavermenrt of laws,existence of the goverment will be imperilled if it faile to observe the law scrup ulously. Our goverment is the potent,the omnipresent,teacher. For good or for ill,it teaches the whole people by its examople. Crim e is contagious. If goverment becomes a law-breaker,it breeds con tempt for law;it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the gove rment may commit crimes in order to secure the conviction of a pr ivate criminal-would bring terrible retribution. Against that per nicious doctrine this court should resolutely set its face. A per son charged with or suspected of the most henious of crimes is st ill entitled to the fundamental fairness we concieve under the no tion of due process vigilante justice is abhorrent to our concept of jurisprudence -wheter the end product be a body dsangling from a rope or a person charged with a crime as a result on the part of a overzealous prosecutor the latter is reprehinsible since bot h society and the accused are victimized by one sworn to uphokld the law.OLMSTEAD v.UNITED STATES.277 US 438.

R E L I E F......

1st claim against the City of New York pursuant to section 42 U.S C.S.1983 for Malicious prosecution.

The city of new york and the district attorney's office acted wit h a deliberate indifference to the plantiff's rights secured by t he 4th,14th amendments of the U.S.Const.by impliedly allowing thi ER ADEAto go by an unofficial govermental custom to misrepresent and falsify evidence to secure inddictment to prosecute also a pr acxtice so persistentn and widespread that it constitutes a cust om of which constructive knowledge can be implied on the part of the policymaking officials of keeping alleged suspects incustody when the ADA's knew no probable cause existed for a lawful detent ion and this was the proximate caiuse of the plantiff's injuries.

Plantiff request a judgement in the amount this court finds reaso nable to compesate him for injuries.

****

2nd claim against the City of New York pursuant to section 42 U.S C.S.1983 for False arrest.

The City of new york and the police department acted with a delib erate indifference to the plantiff's rights secured by the 4th an d 14th amendments of the U.S.Const.by failing to train and superv ise police officers on taking complaints from intoxicated alleged victims and this was the proximate cause of the plantiffs injurie s.

Plantiff request an amount reasonable to this court to compensate him for his injuries.

****

3rd claim against officers Tanatiello,Gacia for false arrest purs uant to 42 USCS 1983 for misdemeanor complaint.

The two defendants placed the plantiff in handcuffs before someon e made a complaint,then heard the cv's story,took the plantiff to precint to see what the prosecutor wanted to do with the plantiff because the information given to them by cv was not reasonable no r trustworthy.

Plantiff request an amount of 50.000 against each def.

4th claim against officer Danielle Wubnig and detective Frank Fransisco in thier individual capacities for false arrest for felony complaint pursuant to 42 USCS.1983.

The plantiff was detained on the misdemeanor complaint stemming from the 1st arrest charges and instead of releasing the plantiff they fabricated charges to arrest him on.

Plantiff request an amopnt of 50.000 against both defendants.

****

5th calim against officer Danielle wubnig and detective frank fransisco in thier individual capacities for malicious prosecution pursuant to section 42 USCS 1983.

Both police officers induced the plantiff to tell them what happened in the building,once he told them they charged him with what he said and the cv never complained of the same thing,and this all, happened while the plsantiffs ear was full of dry blood and wet blood dripping.

Plantiff request an amouynt of 100.000 against both defendant s.

****

6th claim agsainst officers Joseph tanariello and brian garcia in thier individual capacities for failing to bring the plantiff in front of a judge for 'prompt judicial determination' for the misdemeanor complaint from 8-12-2013 til this very day here and the 4th amendment requires a prompt judicial determination of probable cause as a prerequisite to an exrtended pre-trial detention.48 hours is reasonable.

Plantiff request an amount of 100.000 against each defendant.

****

7th claim against ADA's Ariel blinton pizzitola,Troy wilson,Samue l david for being in the clear absense of all jurisdcition and no colorable claim of authority for misdemeanor complaint pursuant t o 42 USCS 1983.

No penal statue or constitutional law gave the three defendants a ny authority to prosecute the plantiff on charges they knew he di d not get arraigned on in locsal court and since they did not sti mulate efforts for remedial action they deprived the plantiff of due process of law.

Plantiff request an amount of 50.000. agaimnst each defendant.

****

8th claim against HHC,Bellvue hospital physciatric ward..Pursuant to 42 USCS 1983.

Since an involuntary confinement to a menataL health care facilit y constitutes a 'massive curtailment of liberty' considerations o f due process require that HHC comport its conduct with the proce dures outlined in the mental hygiene law,and take steps properly to apply the critieria articulated therein. The department of cor rections used force in effecting the seizure and HHC had no proba ble cause because in the 7 days the plantiff did not speak to any one there and they found him fit to proceed thast was illegfal un der the 14th amendment in itself plus the plantiff was around pat ients that was a danger to themselves and others which put the pl antoiffs life in serious danger.

Plantiff request an amount of 1.000.000 against HHC.

****

9th claim against officer Danielle wubnig and detective frank fra nsisco in thier individual capacitieds for violating the plantiff s due process right s by not taking him to the hospital for his bleeding ear.

Plamntiff request an amount of 50.000 against each defendant.

Conspiracy under 42 USCS 1983.

Defendants John doe and jane doe conspired with defendants siracu sa and ward to deprive the plantiff of his right to substantive d ue process by court ordering him to bellvue physh ward just becas e the plantiff wanted an attorney to help½ him with his criminal case and it worked because the plantiff went involuntary to bell vue hospital for 7 days andf by that same conduct deprived the pl antiff of his right to have counsel assist in defending that he w as not mentally ill pursuant to 730.10 subd 1 by siracusa not tel ling jane and john doe my client knows who def ward is(judge)my c lient knows who def wilson is(prosecutor) my client knows who i a m (defense attorney)my client knows he is being accused of mouth to vulva by force and two counts of sexual abuse by force,and he is not a danger to himself or others and 3709/13 should be suppre ssed as fruit of the posounous tree beacuse it was illegally obta ined,and by that same conduct deprived the plantiff of due proces s of law because theb process that was due was to do the abopve.

Plantiff request an amount this court deems just and proper for defendants siracusa,jand and john doe.

****

The clerk of court that read out the indictment charges to the pl antiff on 9-30-2013 in part 71 conspired with tanariello and garc ia,wubnig and fransisco to deprive the plantiff of his right unde r the due process cluse to know what the several other charges ar e by saying the defendant has been indicted on one count of crimi nal sexual act to wit mouth to vulva by force and two countsa of sexual abuse by force and then stated and several other charges and it worked because by him saying several other charges the pla ntiff never knew what those several other charges were while bein g prosecuted on them.

Plantiff request an amount of 50.000 against each defendant.

Defendant wubnig conspired with defendant fransisco to deprive the plantiff of his right to counsel by igmoring the complaint that tanarielo and garcia filed to commenced a action and indu ced the plantiff to make statements and it worked because those statement became the local court arraigment charges ,indictment c harges,sup.court arraignment charges and ultimately pposecuted on those charges for 25months and 17days.

Plantiff request an amount of 50.000 against each defendsant.

****

Defendants constanzo,scharwtz,siracusa and rudman conspired with wubnig,fransisco,pizzitola,wilson,david,ward and the clerk of cou rt who read out the indictment charges to the plantiff on 9-30-20 13 in part 71 to deprive the plantiff of his federalright not to be tried twice for the same offense bynot putting motions or argu]ing otally about the plantiff being accused of mouth to vulva a nd the cv stated mouth to vagina(130.00 2a mouth to vulva or vagi na).

Plantiff request an amount of 50.000 against each defendant.excep t defendant ward.

****

Defendants constanzo,scharwtz,siracusa and rudman conspired with wilson,david,pizzitola,ward,wubnig,fransisco,tanariello,garcia an d the clek of court who read out the indictment charges to cory r eid on 9-30-2013 in part to deprive the plantiff of civil rights in legal effect by keeping quiet the misdemeanor complaint the pl antiff was never arraigned and that worked because that cpmplint is still pending.

Plantiff request an amount reasonable to this court against all d efendants except ward.

Rookard v.Health & Hospital.Corp.,710 f.2d 41(2d cir.1983);see also Familias Unidas v.Briscoe,619 f.2d 391(5th cir.1980)actions of a state judge holding 'absolute sway'over certain decisions can be attributed to the municipality under 1983;williams v.City of Valdosta,689 f.2d 964.for the purpose of affixing liability on a mu nucipality ,it is irrelevant that the decisionmaker enjoys personal immunity for the behavior under attack. The supreme court,imn owen v.City of Independence ruled that a municipality copld not escape liability under 1983 by involking the good-faith immunity of its officers. In fact the personal immunity accorded to city officials miliates in favor of municipal liability,since a contrary ruling would leave victims of unconstitutional conduct without any remedy and city officials without incentive to abide by the Constitution. The municipality may also face 1983 liability for the copduct of officials who enjoy absolute personal immunity. Familias Unidas v.Briscoe,supra(municipality may be held for conduct of a judge.

THISW claim coexist with 1st claim against City of New York.

Plantiff is claiming def ward having absolute sway over the decision to allow the ADA's to prosecute the plantiff even after learning of all the constitutional violations constituted the municipalities final decision for the county of New York. The duties entrusted to her include the actions undelying this case,she has the duty to keep the balance nice,clear and true between the state and the accused,abnd must safeguard the rights of both parties without supervision by any other govermental oficial. Thus at least in those areas in which she alone is the final authority of ultimate repository of county power,her official conduct and decisions must necessarily be considered those of one whose edicts and acts may fairly be ssaid to represent official policy for which the county of new york may be held responsible under 42 U.S.C.S.1983.

Cory Reid
15-15 hazen street
East Elmhurst NY 11370
3491700875

3-[illegible]-2017.

RE:Chief circuit judge,Loretta.A.Preska.

Hello my name is Cory Reid a plantiff looking to prosecute this civil rights complaint. Right now I am working in the kitchen inside the jail,and I currently owe department of corrections money from the criminal case that I was incarcerated on that term inated in my favor. See once I pay the dept. of correc. back I have no problem with paying the whole filing fee and if I am rele ased soon I am going to ready,willing and able which is a working shelter(The Doe Fund)so please give me a chance.

x

Cory Reid..

1981. Equal rights under the law

(a) **Statement of equal rights.** All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) **"Make and enforce contracts" defined.** For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) **Protection against impairment.** The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Explanatory notes:

This section was based upon Act May 31, 1870, ch 114, § 16, 16 Stat. 144.

This section formerly appeared as 8 USCS § 41.

Simila

DES ISLES v. EVANS et al.
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
200 F.2d 614; 1952 U.S. App. LEXIS 2344
No. 14045
December 17, 1952

Counsel Charles Longstreet Weltner, Atlanta, Ga., Sheldon Dubler, Miami, Fla., for appellant.
A. Walton Nall, Atlanta, Ga., John A. Murray and Clarence J. Brown, Jr., Miami, Fla., for appellees.

Judges: Before BORAH, STRUM and RIVES, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: The United States District Court dismissed appellant swimming pool patron's amended complaint against appellee swimming pool operator upon the ground that it failed to state a cause of action upon which relief could be granted. Appellant sought review of the judgment. Dismissal of complaint reversed because the reviewing court could not conclude with reasonable certainty that no facts or circumstances existed that plaintiff could prove to justify the granting of relief.

OVERVIEW: Appellant sought review of a judgment from the district court dismissing his amended complaint upon the ground that it failed to state a cause of action upon which relief could be granted. Appellant's complaint alleged that she was injured when she dove from the diving board at appellee's pool and charged negligence in failing to maintain a lifeguard, in supervising the patrons, and in providing a safe and proper place for divers. The court reversed and held that the complaint was sufficient to state a claim. Appellee owed a duty to appellant as a paying patron to keep the pool reasonably safe. The duty of a swimming pool operator to a patron such as appellee varies depending upon the peculiar facts of the case. The court held that it could not be said with reasonable certainty that no facts or circumstances might be proved by appellant to justify the granting of relief.

OUTCOME: The court reversed and remanded. Appellant's compliant was sufficient to state a cause of action against appellee swimming pool operator. Appellant alleged that appellee was negligent in failing to maintain a lifeguard, in supervising the patrons, and in providing a safe and proper place for divers. The court could not conclude that no facts or circumstances could be proved by appellant to justify the granting of relief.

LexisNexis Headnotes

Torts > Negligence > Duty > General Overview

One who maintains a public resort is required by law to keep it in a reasonably safe condition for those who properly frequent the place. Where the public is invited to attend a resort, it is the duty of the one who so invites to exercise all proper precaution, skill, and care commensurate with the circumstances to put and maintain the place and every part of it in a reasonably safe condition for the uses to which it may rightly be devoted.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

Every pleading is to be construed most strictly against the pleader thereof, and also that a declaration in an action at law should allege distinctly and clearly every fact that is essential to the plaintiff's right of action.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims

A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss

Under the Federal Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings.

Opinion

Opinion by: **RIVES**

Opinion

{200 F.2d 615} This appeal is from a judgment dismissing the amended complaint upon the ground that it failed to state a cause of action upon which relief could be granted. The complaint charged that appellant was a paying patron of appellees' swimming pool; that appellant dove from the low diving board and struck her head against a submerged swimmer, then swimming under water in the diving area of the pool, resulting in serious injuries.

The appellees are charged with negligence in the following particulars: a. in failing to maintain a lifeguard to prevent swimmers from entering 'the portion of the pool reserved for divers'; b. in superintending the patrons of the pool to protect them when using the diving board from under-water collision with swimmers; c. in providing a safe and proper place for divers; d. in policing and supervising the place where a patron could dive from the low diving board.

The substantive duty owed by a swimming pool operator to a paying patron is, of course, controlled by the law of Florida. In Turlington v. Tampa Electric Co., 62 Fla. 398, 56 So. 696, 698, 38 L.R.A.,N.S., 72, the Florida Supreme Court says:

'One who maintains a public resort is required by law to keep it in a reasonably safe condition for those who properly frequent the place. Where the public is invited to attend a resort, it is the duty of the one who so invites to exercise all proper precaution, skill, and care commensurate with the circumstances to put and maintain the place and every part of it in a reasonably safe condition for the uses to which it may rightly be devoted.'

In McKinney v. Adams, 68 Fla. 208, 66 So. 988, 993, L.R.A. 1915D, 442, after referring to the duty to provide proper supervision and proper persons and appliances to rescue patrons in water customarily used by patrons when the patrons themselves are without fault, the Florida Supreme Court says:

'All of these precautions may be duties of the operator of the place who offers its use to the public if the circumstances make such precautions reasonably necessary or expedient for the safety to those who use the waters in the customary way.'

The two Florida cases referred to recognize that contributory negligence is an affirmative defense to be pleaded and proved by the defendant unless it appears in the case made by the plaintiff.

The rule of pleading in Florida was well stated in Kirton v. Atlantic Coast Line R. Co., 57 Fla. 79, 49 So. 1024, 1025:

'It is settled law here that every pleading is to be construed most strictly against the pleader thereof, and also that a declaration in an action at law should allege distinctly and clearly every fact that is essential to the plaintiff's right of action.'

With the application of that rule of pleading to the facts under the substantive law of Florida the Florida Courts have reached varying results in cases involving the duty of a swimming pool operator to a patron of the pool depending upon the peculiar facts and circumstances of the particulcar cases. Complaints in the following cases have been held sufficient: Turlington v. Tampa Electric Co., supra; McKinney v. Adams, supra; Pickett v. City of Jacksonville, 155 Fla. 439, 20 So.2d 484; Ide v. City of St Cloud, 150 Fla. 806, 8 So.2d 924. In the following cases complaints have been held insufficient: Andrews v. Narber, Fla., 59 So.2d 869; Payne v. City of Clearwater, 155 Fla. 9, 19 So.2d 406.

The rule of pleadings in the Federal Courts is different. As stated by Professor Moore, 'the courts have ruled time and again that a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief {200 F.2d 616} under any state of facts which could be proved in support of his claim.' 2 Moore's Federal Practice 2nd Ed., Sec. 8.13 p. 1653. See also Sec. 12.08, p. 2245; Atlantic Coast Line R. Co. v. Mims, 5 Cir., 199 F.2d 582; Stanaland v. Atlantic coast Line R. Co., 5 Cir., 192 F.2d 432, 434; Kohler v. Jacobs, 5 Cir., 138 F.2d 440, 441. As well stated by Judge Sibley speaking for this Court in De Loach v. Crowley's Inc., 128 F.2d 378, 380, 'Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings.'

It cannot be said with reasonable certainty that no facts or circumstances might be proved by the plaintiff to justify the granting of relief. For example, in view of the plaintiff's reference to the portion 'of the pool reserved for divers', the New York case of Byron v. St. George Swimming Club, 283 N.Y. 505, 28 N.E.2d 934, lends strong support to the sufficiency of the complaint. We think that the Court erred in dismissing the amended complaint and its judgment is reversed.

Reversed.

Top Case

The People of the State of New York, Plaintiff, v. Aaron Johnson, Defendant
County Court of New York, Onondaga County
88 Misc. 2d 749; 389 N.Y.S.2d 766; 1976 N.Y. Misc. LEXIS 2739

[NO NUMBER IN ORIGINAL]
December 10, 1976

CASE SUMMARY

PROCEDURAL POSTURE: Defendant filed a motion to suppress identification testimony of a photograph allegedly taken illegally.Court suppressed identification testimony to be offered at a criminal trial on the ground that the photograph was taken illegally.

OVERVIEW: There was a robbery at the restaurant where defendant worked. A day after the robbery, a police officer noted that defendant was listed as an employee of the restaurant, picked him up, and had his photograph taken. Eight months later defendant was charged by an indictment with the robbery. Defendant moved to suppress identification testimony to be offered at the trial on the ground that the photograph was taken illegally. The court determined that two factors made the photograph illegal: it was not taken incidental to an arrest, and the police officer did not have probable cause to believe that defendant committed the crime. However, the court granted a rehearing to determine whether defendant could have been connected to the crime independent of the photograph identification.

statement

OUTCOME: Defendant's motion to suppress was granted because the photograph of defendant was not taken incidental to an arrest and the police officer who took the photograph did not have probable cause to believe that defendant committed the crime.

LexisNexis Headnotes

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence

N.Y. Crim. Proc. Law § 710.20(1) provides that evidence may be suppressed when it consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding the admissibility thereof in a criminal action against such defendant.

Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence

A ruling admitting evidence in a criminal trial has the necessary effect of legitimizing the conduct which produced the evidence, and courts which sit under the U.S. Const. cannot and will not be made party to lawless invasions of the constitutional rights of citizens.

Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence

Fingerprints and photographs can only be taken pursuant to statute.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence

N.Y. Crim. Proc. Law § 160 provides for the mandatory and the permissive taking of fingerprints and photographs. At no place in this article is there any authority for taking and retaining the photograph of an individual without probable cause or arrest. All fingerprinting and photographing must be done where a valid arrest has been made, not merely for investigatory purposes.

Headnotes

Crimes -- identification of defendant -- illegally taken mug shot.

The identification testimony of the robbery victim who identified defendant solely from an earlier illegally taken mug shot picture of defendant is suppressed as being "fruit of the poisonous tree". Eight months prior to his indictment on the robbery charge, defendant was unlawfully detained and photographed by the police at police headquarters in connection with another unrelated robbery. The police illegally retained defendant's photograph in their files despite the fact that he was positively ruled out as a suspect in that crime by eyewitnesses and was therefore never arrested. Defendant's constitutional rights under the Fourth Amendment were violated when his photograph was taken since said photograph was not taken incidental to an arrest, and the police did not have probable cause to believe that defendant committed the crime. Under CPL article 160 photographs of a defendant may only be taken where a valid arrest has been made, not merely for investigatory purposes. The identification of defendant was obtained by "direct exploitation of the original illegality so that the primary taint